

MAINE STATE HARNESS RACING COMMISSION
MINUTES OF MEETING
OCTOBER 25, 2019
BURTON M. CROSS BUILDING, ROOM 208
111 SEWALL STREET, AUGUSTA, ME

Commission Members Present: Michael Timmons, Chair, James Kelley, Jr., Edward Kelleher, and Richard Shiers

Commission Members Absent: William McFarland

Staff Members Present: Ron Guay, AAG, Henry Jennings, Carol Gauthier, Joy Bonenfant, and Miles Greenleaf

1. Executive Session

Commissioner Kelleher moved to enter into executive session to discuss matters pertaining to 1 MRS 405.6a and 405.6e. Commissioner Kelley seconded. Vote 4-0. AAG, Guay stated that is the legal reference just so people in the audience know and for the record. That section of the statute pertains to the role and responsibility of the Commission. The intent is they are going to hear legal advice from their attorney as to their role and responsibilities during meetings. He is aware and people are aware that he plays two roles for this group and that is he serves as counsel to the Commission and it is in that role that he will giving advice to them. He also acts as prosecutor or advocate for the Department of Agriculture. He will not be discussing any matters in relation to his role in that. Moreover, he has asked a colleague of his from the Office of the Attorney General the division of Professional and Regulation to sit in on the executive session not that he does not think he will deviate from the constricts of the executive session but just for additional legal support and she will keep an eye and make sure that he is not straying. The executive session will not stray into any matters where he represents the department.

2. Call the Meeting to Order and Introductions: Michael Timmons, Chair

3. Review and Approval of Minutes

None.

Review and Approval of Decision and Orders

None.

4. Application from LRI, Inc. to relocate its Off-track Betting Facility with the City of Lewiston. LRI, Inc. has submitted an application to relocate its off-track betting facility from 4 Mollison Way in Lewiston to 12 Mollison Way in Lewiston. The Commission will consider whether to approve the application. AAG, Guay stated they have an application from LRI to relocate its off-track betting facility within the city of Lewiston. The statute provides that if somebody moves their facility or if there is a change of ownership it's pretty much the same thing in an initial application, so that section of the statute applies which means it's different than a renewal application and it also requires a hearing and that the Commission do a hearing. So, the good news for that is they could be put on the regular agenda of the Commission and item #5 the renewal applications they do not need to have a hearing, but they do for LRI. He asked the representative from LRI to come to the podium. He gave the oath to Jayne Thornton and James Day from LRI. He stated to Mr. Day and Ms. Thornton that the Commission can hear from you as to your application. Mr. Jennings stated they have copied their application and marked the exhibits. They have also copied the section of the statute for off-track betting facilities. The third item he has is the financial review by Macpage which now goes by Wipfli for all of the off-track betting facilities. AAG, Guay qualified the Commissioners. He asked if there were any objections up to this point. There were none. He asked if there were any people who wish to participate as an intervenor in this proceeding. Gary Sagris from Midcoast OTB and Ed MacColl from Scarborough Downs stated they would like to participate. AAG, Guay stated what that means is that both Mr. MacColl and Mr. Sagris will be allowed to offer evidence, question witnesses, make arguments, and so he will ask questions of both of you. He asked Scarborough Downs if they had any objection to the proceeding up to this point. Ed MacColl stated no. AAG, Guay asked Mr. Sagris if he had any objection to the proceeding up to this point. Mr. Sagris stated no. AAG, Guay stated that the department proposes the introduction of Exhibit 1 which is the license application for LRI, Inc., and they also propose the admission of Exhibit 2 which is the statute regarding the licensing of off-track betting which is Title 8, 275 D, and

finally they propose the admission of the Exhibit 3 which is an opinion from Wipfli formally known as Macpage as to the financial suitability of LRI. Do any parties have any objection to these exhibits being admitted? There were none, so he admitted the exhibits. AAG, Guay stated technically LRI you would go first and then they would hear from the intervenors. Does department wish to make a recommendation before LRI. Mr. Jennings stated they recommend the approval of the application. They reviewed the application, reviewed the statute and he believes all the pieces are in place as for the applicant. AAG, Guay stated that's his argument. He stated to LRI that they can tell the Commission what they wish in terms of their application. You don't have to say anything at all. Mr. Day stated they will let their application speak for itself. They feel it has met all the criteria outlined in Maine statute and if you have any questions, they will be happy to answer them. AAG, Guay stated they will go in this order. Mr. Jennings goes first; he thinks Scarborough was the first intervenor and then Midcoast. He asked Mr. Jennings if he had any questions. Mr. Jennings stated no. AAG, Guay asked Scarborough if they had any questions. Mr. MacColl stated at some point in the past when you were first licensed you had an arrangement with Scarborough Downs that if the Downs wanted to add an OTB you wouldn't object because you have some sort of veto power going back towards it, correct. Mr. Day stated correct. AAG, Guay asked if Midcoast had questions for LRI. Mr. Sagris stated he's had a great working relationship with LRI all the time they've been opened. They run a good business. He supports their move 100 percent. AAG, Guay asked the Commissioners if they had any questions for LRI. They had none. He closed the evidentiary proceeding and he would suggest to the Commission a vote is in order on the application. Commissioner Kelleher moved to accept the application. Commissioner Kelley seconded. Commissioner Shiers asked if this application is for one year or two. Ms. Thornton stated that this application is for the end of this year and then they will be with these people for the renewal. They have another which is exactly the same for next year. Commissioner Timmons asked for a vote. Vote 4-0.

5. **2020 Renewal Applications for Off-track Betting Facilities.** The Commission has received 2020 renewal application from Pioneer Gaming, LLC, Favorites OTB, Waterville, Pioneer Gaming, LLC, Sanford OTB, Sanford, Midcoast OTB, Inc., Winners OTB, Brunswick, and LRI, Inc., Winners Circle, Lewiston. The Commission will consider whether to approve the renewal applications. AAG, Guay stated this matter does not require a hearing. He would suggest a recommendation from the department that the applications are in order but other than that you don't need formal evidence and a hearing, and you can just put it out for a vote. He also stated that LRI is before you again for next year as well as all the other OTB's. Commissioner Timmons asked if that's the same application only it's for 2020. Ms. Thornton stated yes. Commissioner Timmons asked, is there anything in that 2020 document that's significantly different? Ms. Thornton stated no. Commissioner Timmons asked for any questions. There were none. AAG, Guay stated he would suggest your ordinary business kind of meetings. You could ask from the public if you wish or you can ask from the applicants without the procedure. Commissioner Timmons asked from the department. Mr. Jennings stated they recommend the approval of all 4 applicants. Commissioner Timmons stated you've heard from the initial presentation for the renewal, does anyone in the audience wish to have any comments about these applications. Not seeing any, he asked for a motion. Commissioner Kelleher stated so moved to approve. Commissioner Kelley asked Commissioner Timmons which one is he on now. AAG, Guay stated they can do all four. Commissioner Shiers seconded. Vote 4-0.

6. **Adjudicatory Hearings:**

- a. **RE: Russell Lanpher, Jr., Complaint Number 2019 MSHRC 05.** Mr. Lanpher is appealing the decision of Presiding Judge Charles Malia not to place the leading horse due to interference following the Seventh (7th) Race at Scarborough Downs on July 13, 2019. AAG, Guay opened the hearing on Russell Lanpher, Jr. Mr. Lanpher was present. AAG, Guay stated this is in effect a continuation of a hearing that was started. There had been a motion to dismiss, it was granted, and then upon reconsideration you withdrew the finding on the legal motion for dismissal. What that means is you are going to hear the evidence today and make a decision on whether or not the judge's decision is correct. He doesn't need to requalify the Commissioners because you were all at the original hearing. He's going to ask at this point in time if there is any objection to the proceeding up to this point. There were none. He reminded the Commissioners that they need to make a decision today whether or not there was interference and then based on that decision, so that's the decision you have to make and from that decision flows whether or not the

appeal was granted or denied. Commissioner Shiers asked if this is an appeal or a reconsideration. AAG, Guay stated this is an appeal. What happened just to be clear on the procedural part is, this case came up for a hearing and there was a motion to dismiss based on a legal ground that Mr. Lanpher had not file an objection and the Commission on that point overturned previous Commission precedent and granted the dismissal. The Department came to a better understanding of the prior precedent that the Commission had set when additional judges appeals came in and found that the application was going to present problems in the future for the industry. They asked him to do a reconsideration on the dismissal so that's a long way of saying essentially, they're back to the original case and you guys are going to decide the original appeal. He presented the exhibits as: Exhibit 1, Notice of Hearing; Exhibit 2, License Application; Exhibit 3, Race Program; Exhibit 4, Appeal Form; Exhibit 5, 6, and 7 are rules related to appeals. There were no objections to the exhibits. He admitted the exhibits. At this point they watched the video tape of the race. Mr. Lanpher explained the race. Mr. Malia gave his view of the race. AAG, Guay stated he wanted to be clear to the department and to the Commission. This is a de novo proceeding. Who you interviewed, the stuff that you use to make your decision, your judgement doesn't stand unless it's disproved; instead the department has to prove the violation here today? Mr. Malia stated that's what's confusing to him because he's never been in this situation before because he doesn't think anybody's been in this situation before. His understanding of the rules is, unless you're infracted upon or you're penalized there's no action taken there's no reason to move forward. AAG, Guay stated that Mr. Lanpher has to show that that horse was interfered with and he's not sure what this line of testimony is. Mr. Jennings stated there's two things that have to be proven. One is that there was interference and two that that interference was of such a quality that required a placement. Interference in itself doesn't necessarily mean placing first. AAG, Guay stated he would suggest that your first question is whether or not there was interference or not, and if you affirmably say there was that he proved there was interference then he would suggest that you then move to what the correct placements would be. You just saw the video tape do you think there was interference. That's the question you need to answer. Is there anything else that we need to hear, see before you deliberate? Understanding that if you find interference, we may have the judge come up and you can ask the question on placings. AAG, Guay gave Mr. Malia his oath. What did you see at that time when you looked at the tape? Mr. Malia stated he saw a horse make a break. AAG, Guay asked if he saw interference. Mr. Malia stated not only did he not see it he could not substantiate it upon investigation. AAG, Guay stated that's fine. Commissioners would you like to deliberate the question of whether or not there was interference. Commissioner Kelley stated yes. He thinks according to the video there clearly was interference. To him the question is the placings and not whether or not there's interference. AAG, Guay stated if there is a vote then they will recall the judge as to inquiry for placings. Commissioner Shiers stated watching the video he agrees with Commissioner Kelley there was interference, but he does not see how it affected the outcome of the race, so he does not think there should be placings. Commissioner Kelleher stated he's not so sure there was interference. Commissioner Timmons stated yes, he feels there was interference but the outcome of the race and the place where Mr. Lanpher finished was not interfered with. AAG, Guay stated he is going to suggest you vote on whether there was interference and then your second question is what the placement should be. Commissioner Timmons asked for a motion. Commissioner Kelley made a motion that there was interference in the 7th race. Commissioner Shiers seconded. Vote 3-1. Commissioner Kelleher opposed. AAG, Guay stated with your permission Commissioner Timmons we'll recall a witness as to placement. Mr. Malia if you could come up. He asked Mr. Malia what his view was for placings. Mr. Malia stated looking at the race program the placings would be in this case; 2 placed 1st, 4 placed 3rd, 3 placed 2nd, 5, 1 placed 4th. After placings, 2 placed 1st, 4 placed 3rd, 3 placed 2nd, 5 unaffected, 1 placed 4th for interference with the 2 horse. That's the way it would read if in fact that's what he had come to. AAG, Guay state the Commissioners did come to that. Commissioner Shiers stated his opinion is that the 2 horses that interfered were not Mr. Lanpher's horse. It was Mr. Cushing and Mr. Ingraham and neither one of them filed a complaint. And neither one is here. AAG, Guay stated the question is whether Mr. Lanpher who did file an appeal is here whether the placement that he is requesting is reasonable and whether you would in fact order that. Commissioner Shiers stated he doesn't think it's reasonable. Commissioner Kelley had no comment. Commissioner Kelleher moved no placings. Commissioner Shiers seconded. Commissioner Timmons stated that it's been moved that there be no

placings in other words the program as it's here 2,4,3,5,1 would stay as they are. Commissioner Kelleher stated yes. Commissioner Kelley stated that's fine but that's not what the rule says is his problem. Therefore, he can't vote for that motion. AAG, Guay stated if the Commission were to vote that there are no placings. You need to articulate a reason he can put in the decision and order so that a judge upon review would understand your thought process. He also stated that the department didn't think that's the proper interpretation that's why they came back to you and said don't apply it that way. The general rule is all the decisions and rulings of the judges may be appealed. It doesn't say only drivers can appeal. Commissioner Timmons stated the motion on the floor please repeat it. AAG, Guay stated he believes there are no placings. On what basis would there be no placings when the judge indicated what the placings would be if there was interference. Commissioner Timmons asked for any other comments from Commissioners. Should the placings he thinks they said remind the same 2,4,3,5,1 is that true. Commissioner Shiers stated that's where he is. Commissioner Timmons asked who seconded the motion. Commissioner Shiers stated he did. Commissioner Timmons stated it's been moved and seconded that the placings in the program 2,4,3,5,1 would remain the same. AAG, Guay stated just to be clear you want them to not be changed from the placings of record right now. He's asking if the judge said if there was interference the placings would be different, so the judge and Mr. Lanpher both have said if there is interference this is the way it would have been. So, you're going to vote against changing the placings to what the judge said they would be if there was interference, but you found interference, so on what basis are you going to find that the placings shouldn't be changed. You need to explain why if you found interference and the undisputed testimony is if there had been interference these are what the placings are so if you're not going to put those placings in you need to provide a basis why you're not going to do the placings. Commissioner Shiers stated he made his decision based on the video camera the 4-horse got interfered with. He pulled up went to the outside wasn't going to change the outcome of the race he was going to be 4th. The other horse was so far back that he was never going to catch up. AAG, Guay stated that's a basis. He's not saying it is the correct basis but it's a basis. Commissioner Timmons asked for a vote. Vote 3-1. Commissioner Kelley opposed.

- b. RE: Steven Wilson, Complaint Number 2019 MSHRC 06.** Mr. Wilson is appealing the decision of Presiding Judge Dana Delisle to place his horse for interference following the Sixth (6th) Race at Skowhegan Fair on August 13, 2019.
- AAG, Guay opened the adjudicatory hearing on Steven Wilson. Mr. Wilson was present. AAG, Guay qualified the Commissioners. He stated they typically play the video one time without comment and then they will allow people from all the parties to explain how the Commission should view the video. He would give each person an opportunity to show the Commissioners why they think they should win the case. The Commission makes a decision based on the evidence they see here today, and this is a very confusing area and he apologizes to the judges. The standard is that it's de novo. De novo means all the prior findings and stuff there is no longer in effect, so the case is being started fresh and new. The Commissioners are going to see the evidence and they are going to make the decision. At this point they played the video tape of the race. For the record the department has introduced Exhibit 3 which is the race program. Do any parties object to its admission? There were none. He admitted the exhibit. He identified the following exhibits. Exhibit 1, Notice of Hearing; Exhibit 2, Applicant License; Exhibit 4, Appeal Form; Exhibit 5, Copy of Race Rules; Exhibit 6, Appeal Section of the Rules, and Exhibit 7, General Hearing Procedures. There was no objection to the exhibits being admitted. Mr. Jennings called Roger Smith. AAG, Guay gave Mr. Smith his oath. Mr. Jennings asked questions of Mr. Smith. He asked Mr. Smith to give his view of the race. Mr. Jennings called Ron Merrill. AAG, Guay gave Mr. Merrill his oath. Mr. Jennings asked Mr. Merrill to describe his view of the race. Mr. Jennings stated he thinks it's important to hear from the two drivers. He called Heath Campbell. AAG, Guay gave Mr. Campbell his oath. Mr. Jennings asked questions of Mr. Campbell. He asked for his view of the race. AAG, Guay asked if any Commissioners had any questions. Mr. Jennings called Steven Wilson. AAG, Guay gave Mr. Wilson his oath. Mr. Jennings stated to Mr. Wilson to explain his view of what happened. AAG, Guay asked if the Commissioners had any questions. Commissioner Shiers stated that it is their responsibility to reverse the decision if it's beyond a preponderance of a doubt and watching that video he can't make a decision on that video and so he better rely on what the judges saw. AAG, Guay stated for the record that he needs to point out that they have heard from one judge and

not 2 judges and that may be sufficient, so Mr. Merrill didn't see anything, and the other judge is not here to say what he saw. Are there any other witnesses at this point that could be helpful? There were none. Would anybody want to make a closing argument. Commissioner Kelley asked to see the tape again. They watched the video. AAG, Guay stated he thinks they will close the evidentiary proceeding and move to deliberations. In this case the Commission is hearing the case a new. They need to make their decision based on what they're seeing and hearing today. The standard for this unless there's evidence that the judge was wrong the judge wins. That is not the standard and he's not saying that the judge was wrong. Please understand that. The evidence is the Commissioners need to find that there was interference or not and depending on that the appeal is either granted or denied. That's really the only question the Commissioners need to make is based on the video tape and based on the oral testimony whether they think there was interference. He closed the hearing for deliberations. Commissioner Kelleher moved to uphold the decision of the judge. Commissioner Shiers seconded. Commissioner Kelley stated that the last clear frame of the video shows that Mr. Campbell's horse was up to his right-hand wheel. The rest of the video is impossible to tell whether or not for sure he was there. Since the judge was there to see it. He agrees with the motion. Vote 4-0.

7. **Appointment of the Sire Stakes Advisory Committee.** CMR 01-017, Chapter 9, Section 1.1 requires that the Commission appoint a committee of advisors annually to assist the Commission in promoting the program. The staff will present a list of individuals who wish to serve on the committee. Commissioner Timmons asked if there was a list. Miles Greenleaf stated they do. He stated there is one name that is not on the list. That is David Sawyer who's going to represent Scarborough Downs. Commissioner Timmons asked if anyone that is on the Sire Stakes Advisory Committee had any comments. There were none. The list is Diann Perkins, Dr. Dennis Foss, Steve Wilson, David Sawyer, Michael Hopkins, Gary Mosher, Barry Norris, and Kim Pike. He asked if there were any questions. Commissioner Kelley stated that he served on this committee for probably 20 years. The only thing for future reference is you have an odd number on here. You have 8 on instead of 7 whether that's going to be a voting problem he doesn't know but that's just one thing that pops up. He would like to remind the committee that they've always in the past gone and scheduled stake races at all the fairs that wanted them. He just hopes that continues. Commissioner Timmons asked the Commissioners what their wish was on this list. Commissioner Kelleher stated so moved for acceptance. Commissioner Shiers seconded. Vote 4-0.
8. **Discussion About Rulemaking Priorities.** The Commission will discuss any rulemaking needs/priorities for the 2020 season. Commissioner Timmons stated it's a discussion that's worthy because as they move through, they find things within rulemaking that need to be changed or added or updated. He thinks that is a very serious discussion that needs to take place. Commissioner Shiers stated as you know people with positive test that do not show up here be adjudicated. That is a real negative conversation throughout the racing industry about people owning horses and buying horses are racing in Maine and it makes this Commission look somewhat unfavorable too. He wants to see if they just can't expedite this positive test to get adjudicated. AAG, Guay stated he understands the perception. Commissioner Timmons stated he thinks there are others, but he thinks they need to actually say when they come together soon after the race date hearings are over that they bring with them some list be thinking about them. Mr. Jennings stated he's got a complete overhaul of Chapter 13 which is pari-mutuel in the hopper ready to go and he has a complete overhaul of Chapter 17 which has to do with penalties. They are going to look at Chapter 19 and make it a little clear about how we do appeals and make sure that everybody's rights are protected. They've got at least that many and he knows Chapter 7 they'll look at potentially a couple of things like maybe a doctor from the USTA and the whipping rule.
9. **Overview/Update on Prohibited Substance Testing.** Miles Greenleaf will give an overview/update of the prohibited substance testing results. Commissioner Timmons asked Miles Greenleaf for an overview/update. Mr. Greenleaf stated there's one pending for 2018 still. They have a total of 5 positives in 2019 and 3 that are pending. All sire stakes came back clean the pre-race and post-race, and they asked Scarborough to release those checks.
10. **Other Business**

Commission Timmons asked if anyone in the room has any other business, they'd like to bring up. Commissioner Shiers stated he'd like to make a comment as something they could focus on and work on and that is if they're going to depend on replays on these appeals in terms of this camera business and technology, they have at the racetrack it would only be appropriate they all become aware what they have for equipment and see if they can find somewhere in their budget to upgrade these judges audio he understands that some of them have old black and white TV's still in them. AAG, Guay stated he is the attorney for the Department of Agriculture in the race date hearings, so he's not going to make any suggestions to you other than to say that to the extent that you think there should be standard for cameras this is the perfect time to sort of let that expectation be known. He's not saying that in a negative way but it's a lot easier to deal with that in the race date proceedings and relicensing. That's a really good timely observation. Commissioner Kelley stated part of the problem with that Skowhegan video he doesn't think it was as much as the cameras as nighttime racing with very bad lights. You may want to include night racing and lights.

11. Public Comment

Commissioner Timmons asked for public comment.

Ms. Perkins stated she would like to let you know that the sire stakes finals were held October 12th at Scarborough. She thinks a comment should be made that the track surface at Scarborough Downs was the best they've ever seen it. She thinks once in a while giving a compliment to someone helps. That day they had betting over \$100,000. She would like to thank Bangor for having the consolation race up there on Tuesday. She would like to suggest, and she said this for several years they need to do more with officials. She knows there is a rule that says every two years you have an official's school.

Representative Don Marean stated that he thinks a bill that they passed several years ago that appropriates the money from the Commission from within the industry, he thinks there's language in those statutes that allows the Commission to take extra money if it's needed. So, if you're shorthanded and you can't do your work that's justification in his opinion for you to appropriate more money. He thinks you have the authority to do that.

12. Schedule of Future Meetings:

November 7, 2019

November 14, 2019

Mr. Jennings stated that he's not sure whether November 14th will work because of a scheduling issue going on.

13. Adjourn

Commissioner Kelleher moved the motion to adjourn. Commissioner Kelley seconded. Vote 4-0.

1:20 p.m.